

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

DR. MARKUS KITCHENS, JR.
PLAINTIFF

V.

NATIONAL BOARD OF MEDICAL EXAMINERS,
DEFENDANT

CIVIL ACTION NO.:
2:22-CV-03301-JMY

**DECLARATION OF DR. MARKCUS KITCHENS IN SUPPORT OF
PLAINTIFF’S MOTION FOR PRELIMINARY INJUNCTION**

I, Dr. Marcus Kitchens, submit this declaration based upon my personal knowledge. If called upon to testify, I can and will testify truthfully and accurately to the facts contained herein.

1. I am graduated from the Medical University of Lublin in Lublin, Poland (MUL). I completed my coursework in December, 2020 and officially graduated in January, 2021.

2. I must pass the USMLE STEP 1 and STEP 2 to enroll in the ERAS and have the opportunity to enter a residency program and ultimately obtain medical licensure.

3. I have taken the USMLE STEP 1 without accommodations three times. Due to the NBME's rule change on July 1, 2021, I am only allowed to sit for each USMLE STEP examination a total of four times. Therefore, a failed attempt on the USMLE STEP 1 will result in my permanent disqualification from participating in the NRMP and obtain medical licensure.

4. I have taken the USMLE STEP 2 without accommodations two times. I only have two remaining attempts for STEP 2 before I am permanently disqualified from participating in the NRMP.

5. I am a person with disabilities pursuant to the Americans with Disabilities Act (ADA) and have been recognized as such by virtue of being issued unofficial accommodations by Berea College, and official accommodations by the NBME.

6. Due to the NBME's four-attempt limit on each STEP examination, I require an expungement of my examination transcript in order to adequately reflect my skills and knowledge base.

7. I have a history from second grade through the present of having disabilities that impair the major life activities of reading, learning, cognitive processing and test taking.

8. I have been diagnosed with Attention Deficit Hyperactivity Disorder (ADHD). The notable manifestations of this disorder include, but is not limited, to poor reading fluency (i.e. slow reading) and delayed processing of written information.

9. At approximately six or seven years of age (1998-1999), I was evaluated wherein attention-processing speed limitations and ADHD was reported. My teacher provided individualized instruction and intervention for reading and writing at my school in the second grade, coupled with additional remedial reading support arranged by my mother at home.

10. My mother also arranged for me to participate in after-school activities.

11. Throughout elementary and intermediate school, I attended Kumon for private, after-school tutoring in reading, literature, and math. The notable manifestations of my ADHD and poor reading fluency manifested during timed practices in class, such as times tables, where I would know the material when asked but could not perform under tight time constraints.

12. Throughout elementary and intermediate school, my teachers reported that I needed improvement in my conduct due to constantly either being distracted or causing distractions in class, being overly talkative, interrupting the teacher while she was in the middle of instruction, and generally being 'fidgety' or unable to sit still.

13. From third grade to middle school, I had a desk to myself and was separated from my classmates. Oftentimes, I was sat either near the teacher or to the side away from classmates so that I could stay focused and have more individualized instruction with the teacher.

14. In middle school, I began using planners, maintaining detailed calendars with a rigorous schedule, and multiple alarms on my devices in order to keep myself on task and organized in my social life and academically.

15. During this time, I continued to experience difficulties with reading comprehension, writing, attention, and focus. I often was distracted with things in my hands while lost in thought for significant parts of the class, only 'tuning back' to find the class was over. Instead of sitting separated from my peers, I would sit in the front row where I could focus solely on the teacher.

16. From elementary school to ninth grade, I had individual tutoring with my Aunt, Lisa Boston, after school. After the school day ended, I would be dropped off at my aunt's house, who would go over homework assignments, teach time management strategies, and would give me creative memory tools in order to help with recall.

17. In high school, while attending Tyner Academy, I continued to experience difficulty with reading and writing. In particular, I experienced difficulty completing school-based tests within the time limits provided. I was always the last one in my class to complete tests and would run out of time, forcing me to guess on all of the remaining questions.

18. Even during state-wide assessments with unlimited time to complete the test, I would be the last to finish.

19. While undiagnosed at the time, I experienced symptoms of severe test anxiety. Despite having studied for exams and quizzes for weeks and even months, I would have physical changes such as clammy hands, foot tapping, and anxiety leading up to the exam and/or quiz.

20. In Summer 2009, I sat for the ACT twice. Prior to the first attempt, I studied using preparatory books and practice exams for months. Despite my extensive studies, I performed in the 25th percentile. After getting back my score, I took an ACT prep course, which taught time management, how to take the exam, and how to skim longer reading comprehension questions in order to determine what is important. After the prep course, I sat for the ACT a second time and scored in the 50th percentile.

21. In the Fall, 2010, I commenced my undergraduate matriculation at Berea College (“Berea”). While at Berea, I began to struggle with the courseload, the reading requirements for each class, and keeping up my grades while having to study twice or even three times as long as similarly situated classmates.

22. During my Freshman year at Berea, Dr. Alyssa Hanna noticed me struggling to finish my exam(s) and/or quizzes while in the classroom. She was the first teacher to allow me to take my exams in her office on a separate day from my classmates and take as long as I needed to finish. When given the chance to take the exams on my own in an one-on-one setting, I did exponentially better than in the classroom with my peers.

23. Around this time, I went to disability services to get additional assistance as the systems that I used throughout middle and high school no longer worked. Based on what I told health services, I was referred to a psychological professional by Dr. Miriam David for an evaluation for mental and learning disabilities. After being evaluated, I was diagnosed by Dr. David with attention deficit disorder and prescribed Adderall.

24. In 2013, I took the MCAT, which is a standardized exam required for entry into many medical schools. Prior to taking the MCAT, I studied extensively. While taking the MCAT, I had an extreme panic attack due to feeling as though I did not have enough time and my mind running blank and/or too fast. By the time I was able to recover from the anxiety, I lost precious time and was forced to either guess or omit a significant number of questions. As a result of this, I had an extremely poor MCAT score.

25. I received a Bachelor of Arts from Berea in May, 2014.

26. In 2016, I took the MCAT a second time. Prior to taking the MCAT, I studied extensively. While taking the MCAT, I utilized various compensatory strategies in an attempt to maximize the amount of questions that I could read and answer. Nevertheless, was unable to complete most sections of the MCAT and had to guess on many of the questions. Because of this, I was unable to demonstrate my true skills and knowledge.

27. Prior to attending MUL, I emailed MUL listing all of my medications, including Adderall for my ADHD. I received an email from the Dean of the college stating that the medication was illegal in the country and that I would not be able to get it refilled nor take it while a student at MUL.

28. In August, 2016, I commence attending MUL.

29. At MUL, students were allowed up to three (3) retakes on examinations and quizzes. For each examination, I took multiple retakes. While I did not have formal accommodations throughout medical school, with each retake, the time limit on completing the exam(s) were relaxed and less students sat for the retake(s). By the third retake of the exam, I was essentially in a one-on-one setting with flexible time to sit and take the exam.

30. Just prior to graduating, I subscribed to a USMLE STEP tutoring course called SmashUSMLE from February 20, 2020 to April 30, 2020.

31. I received my Medical Doctorate from MUL in January, 2021.

32. Soon after graduating, I enrolled in a USMLE STEP prep course, Prep-Eagle, which lasted January 18, 2021 through February 5, 2021. It was a three week course that met five days a week, Monday through Friday, from 8:00 a.m. to 5:00 p.m. and provided one-on-one coaching.

33. On or about October 22, 2021, I submitted my request for accommodations on the USMLE STEP 1. Prior to submitting my documentation to NBME, I called disability services and asked what document(s) they would need in order to demonstrate my need for accommodations. The NBME advised me to provide whatever I had that I thought was reasonable to prove I needed accommodations. I provided NBME with a personal statement indicating my diagnosis, a letter from my treating primary care physician stating that I had severe test anxiety and needed accommodations, and a progress note from Northwestern Medical indicating I had a prescription for Adderall since 2013 which supported my diagnosis of ADHD.

34. By February 8, 2022, (109 days after the request) Defendant NBME advised me that my request for accommodations for the USMLE STEP 1 was denied and that no accommodations were approved.

35. On February 25, 2022, I sat for the USMLE STEP 1. I put forth an extraordinary effort, over a two year period studying for the USMLE STEP 1 full time. I was confident that I knew the material the exam covered well enough to pass; however, my ability to read through a sufficient number of questions was going to be an extreme challenge given the nature and impact of my impairments.

36. One of the strategies I employed to answer as many questions as possible was to read the last sentence of the vignette first and then back track to the top to skim through reading each passage, attempting to pick out key words and spend a certain limited amount of time to answer each question. Certain questions, for example question stems involving biostatistics, I would not spend time answering because they consumed too much time to complete successfully. These strategies did not allow me full comprehension of exam questions, but rather meant that I was making answer choices based on a sentence or two out of a long paragraph of material. Despite this approach, as I came to the end of the hour for each block, I would then randomly guess at questions until the clock ran out to be sure nothing was left blank.

37. After taking the exam, I did not believe that I was able to read through the reading vignettes sufficiently on the STEP 1 due to my impairments, however, I was optimistic about my score. Due to this, I began studying for the STEP 2 exam.

38. After receiving my score and seeing how poorly I did, my wife reached out to the NBME for a score recheck on March 11, 2022. The NBME responded on March 14, 2022 acknowledging the receipt of her letter and that an investigation was being conducted into my score.

39. On March 17, 2022, the NBME wrote a second letter stating that they had conducted a thorough investigation of my score and found no suspicious or irregular conduct. The NBME also noted that the score was accurate.

40. On March 31, 2022, my wife responded to this letter preserving my right to a score recheck and noted the denial of my accommodations was discriminatory towards my disability. No response from the NBME was received.

41. I studied for an additional three months and sat for the USMLE STEP 1 again on May 9, 2022. I implemented the same strategies I did in the first USMLE attempt while trying to give more attention to the vignettes so as to read each question properly. However, I again, ran out of time and was forced to begin guessing at questions randomly until the clock ran out to be sure nothing was left blank.

42. During this time, I studied for STEP 2 simultaneously so as to attempt to meet the ERAS deadline for the 2022 NRMP program. Since the NBME had already denied my accommodations for STEP 1, I did not apply a second time. My strategy for getting through the Step 2 CK was to utilize a similar strategy that I had used on the USMLE Step 1. However, the reading vignettes on the Step 2 were substantially longer than those contained on the USMLE STEP 1. Accordingly, my strategy to get through the exam was unavailing and I was not able to read through a sizeable portion of vignettes in each block. Consequently, I failed to pass with a score of 169, which was 40 points from a passing score of 209. Once again, because I did not receive appropriate accommodations, I was unable to demonstrate my true skills and knowledge.

43. In frustration and impulsivity, I registered for and took the USMLE STEP 2 examination again a month later on June 29, 2022. Again, the reading vignettes on the Step 2 were substantially longer than those contained on the USMLE STEP 1. My strategy to get through the exam was still unsuccessful despite researching ADHD self-accommodation techniques specifically tailored to the USMLE and I was not able to read through a sizeable portion of vignettes in each block. Consequently, I failed to pass with a score of 195, only 14 points lower than a passing score. This second score demonstrated a 26 point increase from the STEP 2 exam I had attempted a mere 4 weeks prior.

44. On August 30, 2022, I applied for accommodations for a second time to the NBME for the USMLE STEP 1 exam. My request for accommodations included 100% extended time over two days of testing. The documentation furnished the NBME included additional medical records, the letter from Dr. Khan, the appointment confirmation email from the prometric center dated October 27, 2020 which noted extended testing time from the NBME, and my personal statement.

45. On that same day, the NBME Disability Services emailed me stating that I had to provide new documentation not previously included. At the time I applied, the documentation I provided was the only documentation I had.

46. Since I had no new documentation, I decided to sit for the USMLE STEP 1 for a third time on September 29, 2022. By this time, I had been studying for STEP 1 for almost three years and felt as though I had to push forward without accommodations I desperately needed. Leading up to this exam, I studied extensively and worked with a testing advisor to improve the condition and manner with which I processed questions. I felt my knowledge base for the exam was strong but my impairments continued to be a barrier for reading the lengthy vignettes and completing the exam.

47. During the September 29, 2022 exam, I decided to utilize a different strategy to make the most efficient use of my time. I already knew that I would be unable to answer all of the questions within the time allotment so I chose to answer a large portion of the questions with the same answer choice. I believed that statistically speaking, my chances were better if I marked the same answer rather than leaving answers blank or arbitrarily choosing different letters for the questions I was unable to read. The remaining questions were marked with a single letter (I believe "C").

48. My recollection is that at the beginning of each block, I went to the 21st question preemptively and marked all of the questions from 21 to 40 of each block with the same letter (as noted above, I believe "C") for each ensuing answer. This ensured that no questions were left blank. (It probably took me 2 or 3 seconds per question to do this.)

49. I then returned to the first question of the block and proceeded to read and answer as many questions as I could using my best test-taking strategies for the remainder of the time allotted. This strategy was similar to strategies I used in high school during lengthy reading and writing exams.

50. This allowed me to work until the very last available moment on reading questions. An additional benefit was that I did not have to split my attention between reading and watching the clock during the last minutes of the exam out of fear that half the block would be left blank.

51. In total, I estimate that I was able to read to some degree approximately 200 of the 320 questions. In sum, the rest of the answers were filled in with the letter "C" which I hoped would give me a 20% statistical chance of correct answers on those questions I did not have sufficient time to read.

52. With respect to all of my STEP 1 and STEP 2 examinations, because I did not receive appropriate accommodations, I was unable to demonstrate my true skills and knowledge.

53. I have previously completed all my course work at MUL and have received passing scores in all of my course work. Moreover, I received high marks in all of my clinical rotations all of which were completed at Jackson Park Hospital in Chicago, Illinois and Brentwood Psychiatric Hospital in Shreveport, Louisiana.

54. Accordingly, based on the foregoing, I possess the knowledge base and motivation to take and pass both the USMLE STEP 1 and STEP 2 examinations.

55. I have been studying extensive hours every day for three years in order to prepare for the USMLE STEP examinations.

56. If I am not able to complete the USMLE STEP 1 and STEP 2 examinations due to the lack of appropriate accommodations and expungement of my examination transcript, I will be unable to complete my medical education and receive consideration for a residency program. Additionally, if I do not receive an expungement of my examination transcript, given my past performances on the STEP 1 and STEP 2 examinations, I run a very real risk of failing the exam and permanent ineligibility to sit for the USMLE STEP examinations. If I do not pass the USMLE STEP 1 and STEP 2 exams, my aspirations of a medical career will end and I will be left with the enormous debt from medical school costs and fees.

57. My experience in requesting accommodations for the USMLE STEP exams has been very difficult. I have spent numerous hours gathering documentation and undergoing expensive evaluations. Several highly qualified professionals, who personally evaluated and administered psychoeducational measures, have confirmed my disability. I have further had to expend considerable personal time and financial resources to pursue my rights under the ADA.

58. My request for extended time and an expungement of my examination transcript is not to gain a competitive advantage, rather I am seeking to level the playing field with my non-disabled peers.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

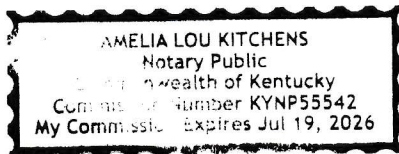
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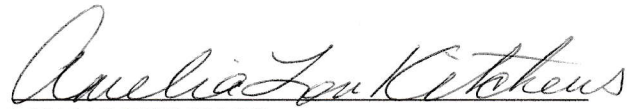

Dr. Marcus Kitchens

COMMONWEALTH OF KENTUCKY)
COUNTY OF MADISON)

Subscribed, sworn to, and acknowledged before me by the Affiant Dr. Marcus Kitchens on this

6th day of February, 2023.




NOTARY PUBLIC

My commission expires: 7/19/26
KYNP55542

